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No.

In The

Supreme Court of the United States

OCTOBER TERM, 1986

ZUCKERMAN PROPERTY ENTERPRISES, LTD., ET AL
d/b/a PINECREST COUNTRY CLUB
Appellants

v.

LOUIS HUSTI, ET AL
Appellees

ON APPEAL FROM THE SUPREME COURT OF CONNECTICUT

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Appellants, Zuckerman Property Enterprises, et al (herein collectively referred to as either "Pinecrest Country Club" or "Appellants")[1] appeal from the final judgment of the Supreme

1 Parties to the Proceeding Before the Supreme Court of Connecticut were: *plaintiffs/appellees* -- Louis Husti and Richard Schultz, former and successor Zoning Enforcement Officers of the City of Shelton, Connecticut, and The Planning & Zoning Commission of Shelton, Connecticut; *defendants/appellants* -- Zuckerman Property Enterprises, Robert Zuckerman, Jonathan Zuckerman, Shelton Yacht & Cabana Club, Inc., Lascal, Inc., and First River Road Corporation.

Court of Connecticut dated May 13, 1986, upholding the constitutionality of the city of Shelton's zoning regulation §23.2 which, as applied in this case, blanketly prohibits as a primary use all outdoor entertainment within the City, including appellants' commercial recreational facility.

QUESTION PRESENTED BY THIS APPEAL

Whether under *Renton v. Playtime Theatres, Inc.* and *Young v. American Mini Theatres*, a municipality containing numerous industrial, commercial and residential zones may, notwithstanding the requirements set forth in *Schad v. Mt. Ephriam*, blanketly prohibit as a primary use all non-obscene outdoor entertainment within its boundaries, including appellants' commercial facility in a residential zone where outdoor entertainment had been performed for over twenty years, and where no existing indoor facility within the City is capable of accomodating entertainment as a primary use, without violating appellants' constitutional guarantees of free speech and expression, due process and equal protection?

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OPINIONS BELOW

The opinion of the Supreme Court of Connecticut, which appears in the appendix hereto, p. 1a *infra*, is reported at 199 Conn. 575 (1986).

The decisions of the Connecticut Superior Court of June 6, 1980 and December 31, 1984 are not reported. Relevant portions of the former, and all of the latter, are reprinted in the appendix hereto, pp. 17a-37a, *infra*.

JURISDICTION

The judgment of the Supreme Court of Connecticut, affirming the constitutionality of the City of Shelton's zoning ordinance §23.2, and dismissing appellant's counterclaim for a permanent injunction against enforcement of said ordinance on First and Fourteenth Amendment grounds, was entered on May 13, 1986.

A notice of appeal to this Court was duly filed in the Supreme Court of Connecticut on July 16, 1986. See p. 39a, *infra*. This appeal is being docketed in this Court within 90 days from the judgment of the Supreme Court of Connecticut.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). Cases believed to sustain jurisdiction include *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981) and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975).

CONSTITUTIONAL PROVISIONS, AND ORDINANCE

First Amendment to the Constitution of the United States:

> Congress shall make no law ... abridging the freedom of speech ...

Fourteenth Amendment to the Constitution of the United States:

> Section I. ... No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

City of Shelton Zoning Ordinance 23.2:

> *Prohibited Uses*: Land, buildings and other structures shall be used for one or more of the uses specified as permitted in Schedule A, and no other. Any use not specified in Schedule A as permitted is prohibited...

STATEMENT OF THE CASE

A. Facts and Procedural History

Pinecrest Country Club has been operated by appellants as a public recreational facility offering restaurant and athletic facilities to its patrons since 1956. Pinecrest began presenting live outdoor musical entertainment amplified over loud speakers at outings in 1957. Since then dances, indoor and outdoor parties, employee picnics and outings, and various private and organizational functions -- with and without music -- have been held each year.

In 1966, Shelton adopted a new zoning ordinance which contained a schedule of permitted uses and a prohibition on all uses not expressly permitted. Outdoor concerns were not expressly permitted anywhere within the City. New zoning regulations were again adopted in 1977. A schedule of permitted uses sim-

ilar to those contained in the 1966 regulations was included. Again, there was a prohibition of all uses not expressly permitted; outdoor entertainment was not expressly permitted. Those wishing to present an outdoor concert had to apply for an amendment to the zoning regulations and/or map. The Planning & Zoning Commission would then advertise and hold a public hearing on the question and render a decision. Alternatively, the promoter of an outdoor concert could apply to the Zoning Board of Appeals for a variance (pp. 53a-55a, *infra*). This application would also require the advertisement and holding of a public hearing prior to a decision.

Neither the adoption of the 1966 zoning ordinance nor amendments to the zoning map in 1977 which changed Pinecrest's classification from rural to residential and industrial impacted upon Pinecrest's operation. Outdoor entertainment events, institutional outings and picnics -- with and without amplified musical performances -- continued to be regularly scheduled.

In the mid-1970's, Pinecrest began to schedule outdoor events including performances by better-known musical groups. These events were open to the general public; admission included the full use of Pinecrest's recreational facilities. In 1976, the City of Shelton held its bicentennial celebration at Pinecrest; 10,000 people came to use the athletic facilities and to listen to concerts given by various bands. Pinecrest's immediate neighbors began to complain about noise and parking problems generated by some of these events. The Shelton Planning & Zoning Commission ("P&Z") began an examination of Pinecrest's compliance with the zoning ordinances which resulted in an advisory ruling to the Zoning Enforcement Officer on April 20, 1979. The ruling stated that Pinecrest was subject to an existing nonconforming use for picnics and outings only, which did not include concerts or the other activities and uses listed in Connecticut Public Act 78-202, (which added new definitions to the Liquor Control Act, C.G.S. §30-1). At no time did the P&Z consider limiting the size of concert audiences at Pinecrest, nor did it review any data or

studies on parking or crowd control at Pinecrest (pp. 50a-51a, 52a, 55a, 57a, *infra*).

The ruling was not appealable by Pinecrest. On May 31, 1979, the Zoning Enforcement Officer issued a cease and desist order against Pinecrest's holding of "concerts" and "theatrical productions." Pinecrest appealed the order to the Zoning Board of Appeals (herein the "first enforcement proceeding"). Over the next several months, public hearings were held in connection with Pinecrest's appeal. The ZBA felt substantial community pressure regarding the Pinecrest Concerts (p. 51a, *infra*). On December 19, 1979 the ZBA upheld the Enforcement Officer.

Pinecrest appealed the order to the Superior Court for the Judicial District of Ansonia/Milford. After hearing, the court dismissed the appeal on June 6, 1980. Pinecrest then petitioned for certification to the Connecticut Supreme Court, which was denied on September 23, 1980.[2]

During this period, Pinecrest sought to obtain from the Shelton P&Z definitions of what constituted "concerts" and "theatrical performances." No definitions were forthcoming.

In 1982, Pinecrest informed Shelton that on July 11, 1982, a charitable event sponsored by a local radio station would be held at Pinecrest, and would include live entertainment. The City sought a temporary injunction to prevent the holding of this event, which the Superior Court denied (the "second enforcement proceeding"). The event took place as scheduled and the City then sought an order holding Pinecrest in contempt. Pine-

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2 In its opinion below, the Connecticut Supreme Court held that the order resulting from the first enforcement proceeding "definitively establishes that the activities therein described are beyond the scope of any existing nonconforming use." 199 Conn. at 578; p. 4a, *infra*. No explanation has ever been given as to why live entertainment that went on for over twenty years, but for which tickets were not sold in advance, must also be prohibited.

crest counterclaimed, seeking an injunction against enforcement of Shelton's ban on outdoor entertainment based on First Amendment grounds. A hearing was held in July, 1982. The matter was then stayed pending determination of a federal action brought by Pinecrest based, *inter alia*, on the First Amendment issues raised by the ban against outdoor entertainment. On June 24, 1983 the District Court for the District of Connecticut (Smith, U.S.M.), dismissed Pinecrest's claims for injunctive anddeclaratory relief on abstention grounds, and stayed further federal action on Pinecrest's claim for damages pending a final resolution of proceedings in the state courts.

On August 30, 1983 Pinecrest moved for a permanent injunction restraining Shelton and its officials from enforcing the prohibition of the presentation of "concerts" and "theatrical performances." After hearing, Pinecrest's motion was denied on December 31, 1984. Pinecrest was ordered to "wholly and absolutely desist and refrain from the use of the property ... for concerts and theatrical performances," under penalty of $5,000 (p. 27a, *infra*).

The Supreme Court of Connecticut, upon review of the same record, rejected all of appellants' First Amendment claims, and similar claims based on the Connecticut Constitution, holding that *Renton v. Playtime Theatres* (rather than *Schad v. Mt. Ephriam*) was the controlling authority. 199 Conn. at 581-86; p. 7a-12a, *infra*.

B. Raising The Federal Question

In the first enforcement proceeding in 1979-80, and in the subsequent petition for certification to the Connecticut Supreme Court, appellants challenged §23.2 as applied to them on vagueness and overbreadth grounds, which claims were rejected by the court (see pp. 32a-34a, *infra*). Prior to the institution of the second enforcement proceedings, this Court handed down its decision in *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981). After institution of the 1982 enforcement proceedings by the City, but

before a decision was rendered on the merits, appellants moved on August 30, 1983 for a permanent injunction against enforcement of Shelton's blanket prohibition of outdoor musical entertainment based upon the First Amendment and *Schad*, and upon applicable provisions of the Connecticut Constitution. Appellants claimed, *inter alia*, that the subject zoning regulations (a) did not further a sufficiently substantial governmental interest; (b) were neither narrowly drawn nor represented the least restrictive method of regulation; (c) were not valid time, place or manner restrictions which left open adequate channels of communication in the City; (d) were not content neutral as applied; (e) were void for overbreadth; (f) were impermissibly vague; and (g) functioned as a prior restraint. The Superior Court rejected each of appellant's First Amendment claims and found all of the issues for the City (pp. 19a-26a, *infra*).

The First Amendment claims were reiterated by Pinecrest before the Supreme Court of Connecticut. There, appellants claimed that the Shelton Zoning regulations violated their federal First Amendment rights to free speech for essentially the same reasons set forth in their motion for permanent injunction before the Superior Court. The Connecticut Supreme Court considered and expressly rejected appellants' federal constitutional claims. (199 Conn. at 579-88; pp. 5a-14a, *infra*).

SUBSTANTIALITY OF FEDERAL QUESTION

This case raises an important First Amendment issue. Do the decisions of this Court in *Renton, v. Playtime Theatres, Inc.*, -- U.S. --, 106 S.Ct. 925 (1986) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976) allow a municipality containing numerous commercial, industrial and residential zones to prohibit all outdoor entertainment where the effect of this prohibition is to ban musical performances at a privately-held facility which had been presenting non-obscene outdoor entertainment for over twenty years? The answer, drawn from this Court's decision in *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981), is no.

The Connecticut Supreme Court's decision upholding Shelton's ban on outdoor entertainment challenges the fundamental First Amendment principal established by this Court that a municipality may not hinder expression without substantial reason, or without leaving open alternative avenues for that expression. The Connecticut Supreme Court upheld a total ban based on a hypothetical possibility of harm. Further, despite this Court's clear statement in *Renton*, 106 S.Ct. at 929, that the holding was limited to "businesses that purvey sexually explicit materials...", the Connecticut Supreme Court cited *Renton* for the proposition that limitations on non-sexually explicit entertainment are nonetheless subject to a reduced standard of scrutiny. 199 Conn. at 581-86; pp. 7a-12a, *infra*. In *Schad*, this Court held that a lessened standard of scrutiny applied to a townwide ban on protected (albeit nude) entertainment was constitutionally infirm.

Entertainment, including musical concerts and dramatic works, is clearly protected First Amendment activity. *Schad*, 452 U.S. at 65; *Southeastern Promotion v. Conrad*, 420 U.S. 546, 557-59 (1975). Since even nude entertainment is presumptively entitled to First Amendment protection, *Schad*, 452 U.S. at 66; *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 8, 213 (1975), music and theatre within the core of traditional First Amendment expression should be entitled to no less. See, e.g., *Young v. American Mini Theatres*, 427 U.S. at 77 (Powell, J., concurring).

The zoning power of municipalities is neither infinite nor unchallengeable; it must be exercised within constitutional limits. *Schad*, 452 U.S. at 68; *Moore v. City of East Cleveland*, 431 U.S. 494, 514 (1977) (Stevens, J., concurring). Zoning regulations have no "talismanic immunity from constitutional challenge." *Schad*, 452 U.S. at 77 (Blackmun, J., concurring) (citing *Young v. American Mini Theatres*, 427 U.S. at 75 (Powell, J., concurring)). The minimal scrutiny used in the rational relationship test is insufficient to sustain the constitutionality of

land use regulations that impinge upon protected First Amendment expression. *Id.; see also, Thomas v. Collins*, 323 U.S. 516, 529-30, *reh. den.*, 323 U.S. 819 (1945) (First Amendment protected speech cannot be restricted when there is merely a "rational connection between the remedy provided and the evil to be curbed"). Any system which requires or permits prior restraint on expression bears a heavy presumption against its constitutional validity. *Southeastern Promotions v. Conrad*, 420 U.S. at 558; *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). That presumption is not shifted from the municipality to the appellants even upon a showing of rationality. *Schad*, 452 U.S. at 77 (Blackmun, J. concurring).

Accordingly, governmental limitations on First Amendment freedoms are constitutionally permissible only if the regulation is narrowly drawn, represents the least restrictive method of regulation, and advances a substantial governmental interest. *Id.*, 452 U.S. at 68-70. Further, time, place and manner restrictions must not only serve significant state interests but also must leave open adequate channels of communication." *Id.*, 452 U.S. at 75-76 (citations omitted).

The Supreme Court of Connecticut, in affirming the decisions of the lower courts which banned all outdoor entertainment at Pinecrest based on Shelton's zoning ordinance, gave perfunctory attention to these constitutionally-based requirements. It held that under *Renton*, substantial governmental interests may be satisfied by the City's mere claim, *wholly unsupported by the record or by any data or studies*, that outdoor entertainment at Pinecrest "threatened the quality of life and the safety of the inhabitants of the neighborhood by causing noise, attracting crowds, and creating traffic congestion." 199 Conn. at 582; p. 8a, *infra*. It further held that *Renton* allows relaxed scrutiny of the "narrowly drawn" and "least restrictive method of regulation" requirements merely upon the municipality's unsupported *claim* that threats "to safety and tranquility" were "likely". *Id.* at 584; p. 10a, *infra*. Further, the court

held that the narrowly drawn and least restrictive test is excused merely upon the City's speculative *assertion* that there was a "significant possibility" that less restrictive methods "would have been impractical, ineffective and even counterproductive."[3]

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The Connecticut Supreme Court also gave perfunctory attention to this Court's repeated admonition that time, place and manner restrictions must also leave open adequate alternative channels of communication. *Schad*, 452 U.S. at 75-76; *Grayned v. City of Rockford*, 408 U.S. 104, 116, 118 (1972). The court ignored the fact that Pinecrest had long held outdoor musical events at its existing facility prior to the City's enactment of §23.2 in 1966, and that beginning with its enforcement activity against Pinecrest in 1979, the City used §23.2 to ban *all* outdoor entertainment -- at Pinecrest and everywhere else in Shelton -- as a primary use (see pp. 46a-48a, *infra*). The court held that since outdoor entertainment was theoretically possible as an accessory use in certain areas of Shelton,[4] the alternative channels requirement was satisfied. 199 Conn. at 585; p. 11a, *infra*. The court further held that Pinecrest could not complain that indoor or accessory use concerts would not be financially viable, since *Renton* states that the First Amendment does not compel the Government "to ensure that ... speech related businesses... will be able to obtain sites at bargain prices..." (citing *Renton* at 932). 199 Conn. at 586; p. 12a, *infra*.

Renton, however, merely held that adult theatre operators do not have a constitutional right to locate in the least expensive part

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3 The Court held: "[O]ur concern is whether the City had a substantial interest in protecting the residential community from *potential adverse consequences* of the presentation of outdoor concerts at Pinecrest..." (emphasis added). 199 Conn. at 584; p. 10a, *infra*.

4 Some examples of accessory uses would be background music at a store opening or a string quartet playing on a veranda of a restaurant. Obviously, this is hardly the same as a concert, where the focus is on the music alone.

of town. 106 S.Ct. at 932. *Renton* does not require that a recreational facility/restaurant operator who has been presenting outdoor entertainment for over twenty years must diversify his interests by building and operating an indoor entertainment facility whenever a municipality bans all outdoor entertainment. And even assuming, *arguendo*, that *Renton* must be read this broadly, the Connecticut Supreme Court overlooks that outdoor entertainment is a special medium, with unique characteristics that indoor theatres cannot duplicate.

While Shelton is empowered to enact zoning ordinances, see Conn. Gen. Stat. §8-2, it has failed to establish any compelling, or even real, interest in totally suppressing outdoor entertainment at Pinecrest and throughout the City. This failure by the City is underscored by the broad sweep of the City's enforcement of §23.2. Shelton's Mayor testified that the City intended to ban "all outdoor musical events" (pp. 46a-48a, *infra*). While the trial court held, and the Connecticut Supreme Court agreed, that the regulations were not *intended* to impair protected expression, 199 Conn. at 579; p. 5a, *infra*,[5] there is little question that enforcement of §23.2 was predicated on City officials' desire to eliminate outdoor concerts *at Pinecrest* (pp. 47a, 52a, *infra*) *particularly rock concerts* (*id.* p. 49a). Thus, suppression of this particular form of expression appears to be the only purpose underlying enforcement of the regulation. Although §23.2 is related to an identifiable interest, it is being used by the City to eliminate from within its boundaries all outdoor entertainment. In addition, *the injunction now in effect against Pinecrest prohibits not only pre-ticketed outdoor concerts, which began in 1975, but all outdoor musical events, including those that had been held without objection since 1957* (*id.*, p. 47a).

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5 The "intent" of the zoning regulations hypothesized by the Connecticut Supreme Court in order to distinguish *Schad* -- the City's interest in maintaining a "noise free residential zone", 199 Conn. at 584, p. 10a, *infra* -- is utterly implausible. The ban on outdoor entertainment is city-wide, and applies to commercial and industrial, as well as residential, zones. See testimony of Mayor Hope, p. 40a, *infra*.

The Connecticut courts have declined to limit the sweeping prohibitions of §23.2. The first decision of the Superior Court forbade all "public performances by an aggregation of musicians, singers and dancers, all performing in an open setting at Pinecrest" (p. 34a, *infra*). The second decision repeated this same prohibition (*id.* p. 27a). Thus, the production of all musical plays, ballet, folk, opera, jazz, rock, gospel, country and western music, and performances by a solo flutist or a chamber ensemble are all totally banned at Pinecrest (*id.*, p. 46a-48a). The irrational nature of this prohibition, as enforced, is shown by the fact that non-musical events, such as picnics and outings, are permitted throughout Shelton, including Pinecrest, irrespective of the number of persons attending. Picnics and outdoor musical events may both attract large -- or small -- crowds. There is no evidence in the record supporting disparate treatment of picnic crowds and music crowds; both raise similar problems of police and fire protection, sanitation and parking.[6] Yet Shelton has taken the position, sustained by the Connecticut courts, that the City has a substantial interest in allowing the former without restriction, while entirely banning the latter. Accordingly, Shelton has wholly excluded from its borders a fully-protected form of expression that is indistinguishable from the permitted use. This exclusion is irrational, and violates the clear precepts of *Schad*.

Just as arbitrary is Shelton's application of its zoning scheme to Pinecrest. The invalidity of §23.2 and the impropriety of its application to Pinecrest is clear. If allowed to stand, the injunctions against appellants will invite other municipalities throughout the United States to rely on *Renton* to justify broad, repressive application of similar zoning ordinances in order to effectively

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6 As Shelton Police Chief Siraco testified, different types of persons attend different events, but an orderly crowd remains so, no matter how many people attend (p. 56a, *infra*). In addition, while Pinecrest staged many different types of events, the only apparent problems were from rock concerts (*id.*, 49a).

suppress existing non-obscene forms of expression which some officials may simply dislike.

Finally, review is indicated here in order to make clear to municipalities that *Young* and *Renton* are limited in their application to the *location* of *new adult theatres* and do not apply to the First Amendment activities of existing establishments. *See, Young v. American Mini Theatres*, 427 U.S. at 71, n. 35.

This Court is respectfully urged to review the decision by the Connecticut Supreme Court sustaining the injunctions entered by the trial courts in order to protect the First Amendment, due process and equal protection rights of the appellants.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX

Decision of the Connecticut Supreme Court (May 13, 1986)

LOUIS HUSTI ET AL. *v.* ZUCKERMAN PROPERTY ENTERPRISES, LTD., ET AL.
(12689)

PETERS, C. J., HEALEY, DANNEHY, CALLAHAN and TAMBORRA, Js.

The plaintiff zoning enforcement officer of the city of Shelton and the plaintiff planning and zoning commission of that city sought injunctive relief to compel the defendants to comply with a commission order that prohibited the defendants from conducting outdoor concerts at a country club they owned that was located in an R-1 residential zone. That order

had been upheld by the zoning board of appeals and by the Superior Court. Prior to issuing the order, the commission had determined that, under the Shelton zoning regulations, the property in question was subject to an existing nonconforming use for picnics and outings, which use did not include concerts and similar activities. From the judgment of the trial court issuing the requested injunctive relief, the defendants appealed claiming that the zoning regulations in question violated their federal and state constitutional rights to free speech. *Held:*

1. The defendant's claim that the Shelton zoning regulations were facially invalid as a violation of their federal first amendment right to free speech was unpersuasive; the Shelton zoning plan did not regulate speech on the basis of its content but imposed valid time, place and manner restrictions that were designed to serve a substantial governmental interest in protecting the residential community from potential adverse consequences of outdoor concerts, that were not unnecessarily restrictive and that allowed reasonable alternative avenues of communication.
2. The defendants had no standing to pursue their claim that the Shelton zoning regulations were unconstitutionally overbroad in that they impinged on the protected speech of others, they having made no showing of a danger that the regulations were likely to impinge significantly on the rights of those not before the court.
3. Since the defendants had not exhausted the administrative remedies available to them under the Shelton zoning plan, they could not claim that, by enforcing the zoning regulations against them, the city had denied them their right to freedom of speech under the state constitution.

Argued February 14—decision released May 13, 1986

Action to enjoin the defendants from using certain of their property for concerts and theatrical performances, and for other relief, brought to the Superior Court in the judicial district of Ansonia-Milford, where the defendants filed a counterclaim, and tried to the court, *Rottman, J.;* judgment for the plaintiffs on the complaint and on the counterclaim, from which the defendants appealed. *No error.*

Alan Neigher, with whom, on the brief, was *Judith M. Truitt,* for the appellants (defendants).

John H. Welch, Jr., with whom were *Jean Maguire* and *John Bashar,* for the appellees (plaintiffs).

PETERS, C. J. The issue in this case is whether enforcement of a zoning regulation prohibiting the use of a country club's property for outdoor concerts or theatrical performances violates rights to free speech protected by the federal and the state constitutions. The named plaintiff, Louis Husti, the acting zoning enforcement officer of the city of Shelton, and the planning and zoning commission of the city of Shelton sought injunctive and other equitable relief to compel the defendants, Zuckerman Property Enterprises, Ltd., and others doing business as the Pinecrest Country Club,[1] to comply with an order of the zoning enforcement officer concerning the use of the defendants' property. That order, issued in 1979, was upheld in a decision of the Shelton zoning board of appeals. The defendants' appeal to the Superior Court, *Glass, J.*, was, after a hearing, dismissed and this court denied certification. The trial court, *Rottman, J.*, issued the injunction and the defendants have appealed.

The underlying facts are established by the memorandum of decision filed by Judge Glass in the original appeal. The defendants are the owners of a country club located in a part of Shelton that has been zoned as an R-1 residential zone since 1955. In 1970, the management and operation of the country club was taken over by the defendants Robert and Jonathan Zuckerman. They improved the facilities and, in 1975, decided to book outdoor musical events at the club. The concerts were widely advertised, and tickets were sold at the entrance to the club premises. Musical groups performed on a stage with large amplifiers stacked on top or alongside of each other on the stage. The concerts, some of which were held in the early evening and continued into the night, drew thousands of people to the

[1] The other named defendants were Robert Zuckerman, Jonathan Zuckerman, Shelton Yacht and Cabana Club, Inc., Lascal, Inc., and First River Road Corporation.

country club. The concerts resulted in considerable traffic congestion and the noise they generated could be heard at great distances.

The Shelton planning and zoning commission concluded, at a special meeting on April 20, 1979, that the country club property "is subject to an existing nonconforming use for picnics and outings only, and does not include concerts or other activities and uses listed in Public Acts 1978, No. 78-202; said activities not being permitted by the current zoning and in violation of Section 41.4 of the zoning regulations." On May 21, 1979, the Shelton zoning enforcement officer issued an order to the defendants that: "You are hereby ordered to cease the use of the property for concerts and theatrical performances and to take such action as may be necessary to cancel any scheduled performances or activities which would be in violation of the Zoning Regulations." The zoning order was upheld by the zoning board of appeals, and by the Superior Court. This court denied certification on September 23, 1980. The order therefore definitively establishes that the activities therein described are beyond the scope of any existing nonconforming use.

Despite the order, the defendants continued to offer live entertainment at the country club. The plaintiffs unsuccessfully sought a temporary injunction prohibiting further concerts and theatrical performances, and the defendants unsuccessfully sought an immediate injunction against the plaintiffs in federal court. Both parties then pursued their claims for permanent injunctions in the trial court before Judge Rottman, who temporarily enjoined the defendants while the claims were pending.

In the hearing before Judge Rottman, the plaintiffs sought enforcement of the regulations whose validity had been established by Judge Glass. The trial court

ruled that the plaintiffs were entitled to equitable relief to enforce the zoning regulations without a showing of irreparable harm. General Statutes § 8-12; *Johnson* v. *Murzyn*, 1 Conn. App. 176, 180, 469 A.2d 1227, cert. denied, 192 Conn. 802, 471 A.2d 244 (1984). That matter is no longer at issue.

The crucial issue before Judge Rottman, and this court, is a constitutional question concerning federal and state constitutional guarantees of free speech. The defendants claim that the right of free speech encompasses live entertainment such as the concerts that they have staged at the country club, and that Shelton's zoning regulations unconstitutionally infringe on their right of free speech. The trial court upheld the validity of the zoning regulations. It concluded that while the Shelton zoning regulations forbade outdoor live entertainment as a principal use, it permitted such concerts in some zones as an accessory use. It determined that the adoption of the zoning regulations was the result of a substantial concern for adequate land use regulation and that the regulations were not intended to impair free speech in general or the content of a protected form of expression in particular. The court found the zoning regulations to be content-neutral, and a valid "time, place and manner" restriction. It held that the regulations had been narrowly drawn and that they were no more extensive than necessary to serve legitimate zoning interests. On the basis of all of these considerations, the court concluded that "the application of the zoning regulations under the circumstances of this case to the Defendants' property is not unconstitutional."

I

The first issue that we must resolve is the defendants' claim of a violation of their federal first amendment right to free speech. This claim involves an inquiry

into the defendants' own constitutional rights and into the claimed facial invalidity of the Shelton zoning regulations. We do not find it persuasive.

A

In reviewing the defendants' federal claim, we first note that there is little question that local governments possess the constitutional authority to regulate the use of land. We have held on numerous occasions that zoning restrictions, so far as they reasonably promote public health, safety, and welfare without depriving landowners of all economically viable use of their property, are constitutional even though the effect of the restrictions may be to limit the exercise of private property rights. See, e.g., *Chevron Oil Co.* v. *Zoning Board of Appeals*, 170 Conn. 146, 151, 365 A.2d 387 (1976); *St. John's Roman Catholic Church Corporation* v. *Darien*, 149 Conn. 712, 722-23, 184 A.2d 42 (1962); *Poneleit* v. *Dudas*, 141 Conn. 413, 417-18, 106 A.2d 479 (1954); see also *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303 (1926). When zoning law constricts the realm of permissible expression, however, we employ a heightened level of scrutiny to determine whether the law is valid under the first amendment to the United States constitution. The parties in this case agree that entertainment, including concerts and theatrical productions, is constitutionally protected speech that may be regulated only in certain circumstances and with sufficient justification. See *Schad* v. *Mount Ephraim*, 452 U.S. 61, 65, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981); *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 95 S. Ct. 2561, 45 L. Ed. 2d 648 (1975); *Erznoznik* v. *Jacksonville*, 422 U.S. 205, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975). We must decide whether constitutional justification exists in this case for Shelton's exclusion of outdoor entertainment from a residential area.

We begin our inquiry by observing that the Shelton zoning plan does not regulate speech on the basis of its content. The regulations prohibit all outdoor entertainment, regardless of its message, in the residential zone that contains the defendants' club. Nothing in the record indicates that the city government is using zoning to stifle expression that it deems distasteful. Instead, the zoning restriction represents an attempt by the zoning board to confine the presentation of outdoor concerts to sections of the city that are well suited to accommodate the secondary effects of such activities. See, e.g., *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 104 S. Ct. 3065, 3069, 82 L. Ed. 2d 221 (1984).

The United States Supreme Court has recently held that a content-neutral zoning regulation that restricts the permissible time, place, and manner of protected speech is constitutional under the first amendment if the regulation "is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication." *Renton* v. *Playtime Theatres, Inc.,* U.S. , 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986); see also *Clark* v. *Community for Creative Non-Violence,* supra; *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 807, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640, 649, 654, 101 S. Ct. 2559, 69 L. Ed. 2d 298 (1981); *Friedson* v. *Westport,* 181 Conn. 230, 235–36, 435 A.2d 17 (1980). Our review of the trial court's findings, and of the underlying record convinces us that both criteria were satisfied in this case.

A city has undeniably important interests in protecting the character of its residential neighborhoods and in promoting the health, safety, and welfare of its citizens. See *Belle Terre* v. *Boraas,* 416 U.S. 1, 5–6, 94 S. Ct. 1536, 39 L. Ed. 2d 797 (1974); *Berman* v.

Parker, 348 U.S. 26, 31–33, 75 S. Ct. 98, 99 L. Ed. 27 (1954). As Justice Marshall has observed, "[zoning] may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Belle Terre* v. *Boraas*, supra, 13 (Marshall, J., dissenting). The trial court in this case reasonably concluded that performances at an outdoor amphitheater located in a residential area threatened the quality of life and the safety of the inhabitants of the neighborhood by causing noise, attracting crowds, and creating traffic congestion. These are precisely the kinds of dangers that zoning is meant to combat; see General Statutes § 8-2;[2] and that justify content-neutral regulation of the time, place, and manner of expression. See, e.g., *Clark* v. *Community for Creative Non-*

[2] "[General Statutes] Sec. 8-2. REGULATIONS. The zoning commission of each city, town or borough is authorized to regulate, within the limits of such municipality, the height, number of stories and size of buildings and other structures; the percentage of the area of the lot that may be occupied; the size of yards, courts and other open spaces; the density of population and the location and use of buildings, structures and land for trade, industry, residence or other purposes, and the height, size and location of advertising signs and billboards. Such zoning commission may divide the municipality into districts of such number, shape and area as may be best suited to carry out the purposes of this chapter; and, within such districts, it may regulate the erection, construction, reconstruction, alteration or use of buildings or structures and the use of land. All such regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district, but the regulations in one district may differ from those in another district, and may provide that certain classes or kinds of buildings, structures or use of land are permitted only after obtaining a special permit or special exception from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values. Such regulations shall be made in accordance with a comprehensive plan and shall be designed to lessen congestion in the streets; to secure safety from fire, panic, flood and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concen-

Violence, supra, 3069–71; *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent,* supra, 804–809; *Kovacs* v. *Cooper,* 336 U.S 77, 86–87, 69 S. Ct. 448, 93 L. Ed. 513 (1949). Consequently, the trial court correctly found that the city had imposed restrictions on outdoor entertainment at Pinecrest in furtherance of substantial government interests.

The defendants claim that the presentation of concerts at Pinecrest did not deleteriously affect the surrounding neighborhood because industrial enterprises were located on nearby property that was zoned for commercial purposes. They contend that because the area was already, in effect, a quasi-business district, their use of Pinecrest was appropriate. We reject this argument. Judge Glass has held, in a separate proceed-

tration of population and to facilitate the adequate provision for transportation, water, sewerage, schools, parks and other public requirements. Such regulations shall be made with reasonable consideration as to the character of the district and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such municipality. Such regulations shall also encourage the development of housing opportunities for all citizens of the municipality consistent with soil types, terrain and infrastructure capacity. Zoning regulations may be made with reasonable consideration for the protection of historic factors and for the protection of existing and potential public surface and ground drinking water supplies and may provide that proper provision be made for sedimentation control, and the control of erosion caused by wind or water. Such regulations may also encourage energy-efficient patterns of development, the use of solar and other renewable forms of energy, and energy conservation. The regulations may also provide for incentives for developers who use passive solar energy techniques, as defined in subsection (b) of section 8-25, in planning a residential subdivision development. The incentives may include, but not be limited to, cluster development, higher density development and performance standards for roads, sidewalks and underground facilities in the subdivision. Such regulations shall not prohibit the continuance of any nonconforming use, building or structure existing at the time of the adoption of such regulations. Any city, town or borough which adopts the provisions of this chapter may, by vote of its legislative body, exempt municipal property from the regulations prescribed by the zoning commission of such city, town or borough; but unless it is so voted municipal property shall be subject to such regulations."

ing, that Shelton's zoning regulations do not permit the defendants to hold concerts at Pinecrest. His findings are conclusive in this proceeding. See *Corey* v. *Avco-Lycoming Division,* 163 Conn. 309, 317, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S. Ct. 903, 34 L. Ed. 2d 699 (1973); *Brockett* v. *Jensen,* 154 Conn. 328, 337, 225 A.2d 190 (1966); see also *Santora* v. *Miklus,* 199 Conn. 179, 188, A.2d (1986); *Department of Health Services* v. *CHRO,* 198 Conn. 479, 487–88, 503 A.2d 1151 (1986); *Cologne* v. *Westfarms Associates,* 197 Conn. 141, 147, 496 A.2d 476 (1985). Accordingly, we do not here review the reasonableness of the classification of the neighborhood as residential. Our concern is whether the city had a substantial interest in protecting the residential community from potential adverse consequences of the presentation of outdoor concerts at Pinecrest. There is little question that it did.

The defendants further claim that even if Shelton did have a substantial interest in protecting the community, its means of pursuing that interest, the exclusion of outdoor concerts from the neighborhood, was unnecessarily restrictive. We disagree. Shelton's regulation serves to remove from residential neighborhoods some likely causes of threats to safety and tranquillity. Arguably the city could have chosen to address these dangers specifically by limiting the decibel levels of concerts, limiting audience size, requiring the defendants to police their concerts, and imposing traffic restrictions. In light of the significant possibility that such measures would have been impractical, ineffective, and even counterproductive; see *Planning & Zoning Commission* v. *Zemel Bros., Inc.,* 29 Conn. Sup. 45, 270 A.2d 562, petition for review dismissed, 159 Conn. 638, 268 A.2d 248 (1970); we cannot say that the exclusion of concerts from a residential district was not sufficiently narrowly tailored to accommodate the city's substantial interests. See *Renton* v. *Playtime Theatres, Inc.*, supra, 932.

The second prong of the standard articulated in *Renton* requires that time, place, and manner restrictions on speech provide for reasonable alternative avenues of communication. An examination of the Shelton zoning regulations reveals that indoor entertainment is permitted as a primary use in certain zones, and that outdoor entertainment is permissible as an accessory use of property where outdoor entertainment is "customary with and related to a permitted use." Although the determination of the scope of accessory uses is, in the first instance, a matter for the Shelton zoning board, the trial court observed, and we agree, that the plain language of the regulations indicates that outdoor entertainment is a proper accessory use of property in certain sections of the city.[3] The defendants claim in a conclusory fashion that the Shelton zoning board would probably not allow outdoor entertainment as an accessory use of any property in the city. The defendants have made no attempt, however, to substantiate their allegations by seeking permission to hold concerts on property whose zoning classification would suppport such events as an accessory use. Consequently, they offer this court no basis on which to reject the trial court's interpretation of the regulations.

The defendants contend that the alternatives available in Shelton do not provide adequate avenues of communication because their concerts would not be profitable if held indoors or as an accessory use to properly classified land. The United States Supreme Court in *Renton* responded to a similar claim by noting that "although we have cautioned against the enactment

[3] For example, the Shelton zoning regulations permit, in one or more zones, theaters, assembly halls, hotels, restaurants, schools, colleges, membership clubs, recreation facilities, lodges, and community houses. The zoning board could reasonably classify live entertainment as an "accessory us[e] customary with and incidental to" any of these permitted uses. See Shelton Zoning Regulations Schedule A; see also *Beit Haurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 447, 418 A.2d 82 (1979).

of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' [*Young* v. *American Mini Theatres,* 427 U.S. 50, 71n. 35, 96 S. Ct. 2440, 49 L. Ed. 2d 310,] (plurality opinion), [reh. denied, 429 U.S. 873, 97 S. Ct. 191, 50 L. Ed. 2d 155 (1976),] we have never suggested that the First Amendment compels the Government to ensure that . . . speech-related businesses . . . will be able to obtain sites at bargain prices." *Renton* v. *Playtime Theatres, Inc.,* supra, 932. We cannot conclude on this record that Shelton's zoning regulations effectively exclude concerts from the town. Since the regulations meet the requirements set out in *Renton,* they do not, as applied to the defendants, violate the first amendment.[4]

B

The defendants also claim that Shelton's zoning regulations are, as a matter of federal law, unconstitutionally overbroad. They argue that even if the city may prohibit concerts at Pinecrest, the zoning regulations are so broadly written that they impinge upon the protected speech of others. We do not review this claim because, as the trial court held, the defendants lack standing to pursue it.

[4] The defendants also argue that Shelton's application of its zoning regulations violates the equal protection clause of the fourteenth amendment to the United States constitution. Citing a number of instances in which the city has permitted picnics at Pinecrest and outdoor entertainment in other sections of town, they claim that the city has discriminatorily enforced its zoning laws to ban rock concerts at Pinecrest. See *Yick Wo* v. *Hopkins,* 118 U.S. 356, 373-74, 6 S. Ct. 1064, 30 L. Ed. 220 (1886).

This contention finds no support in the record. The city permitted picnics at Pinecrest because, as Judge Glass held, Pinecrest's nonconforming use includes picnics. The other outdoor events referred to by the defendants were presented in sections of town that were not classified as residential districts. These events serve not as proof of a denial of equal protection, but as evidence that the zoning plan does provide opportunities to present outdoor entertainment in the city of Shelton.

Litigants are sometimes allowed to challenge the validity of laws on first amendment grounds where the law would be invalid as applied to others even if the law is constitutional as applied to the litigant. Courts permit overbreadth claims because "persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression." *Gooding* v. *Wilson,* 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972); see also *New York* v. *Ferber,* 458 U.S. 747, 772, 102 S. Ct. 3348, 73 L. Ed. 2d 1113 (1982); *Schaumburg* v. *Citizens for a Better Environment,* 444 U.S. 620, 633–35, 100 S. Ct. 826, 63 L. Ed. 2d 73, reh. denied, 445 U.S. 972, 100 S. Ct. 1668, 64 L. Ed. 2d 250 (1980); *Grayned* v. *Rockford,* 408 U.S. 104, 114–21, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972); *Broadrick* v. *Oklahoma,* 413 U.S. 601, 611–13, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973); *Thornhill* v. *Alabama,* 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940).

A party has standing to raise a claim of overbreadth only if "there [is] a realistic danger that the statute will significantly compromise recognized First Amendment protections of parties not before the Court . . . ." *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); see also *Erznoznik* v. *Jacksonville,* 422 U.S. 205, 216, 95 S. Ct. 2268, 45 L. Ed. 2d 125 (1975); *Broadrick* v. *Oklahoma,* supra, 613–15. The defendants in this case argue that the Shelton zoning regulations jeopardize access to outdoor entertainment throughout Shelton and implicate protected activities such as political speech. These arguments cannot be sustained without a showing of a foundation for the "realistic danger" that the defendants envisage. The record does not support a claim that all outdoor enter-

tainment is barred everywhere in the city of Shelton. The defendants' contention that the language of the zoning regulation is broad enough to exclude outdoor political speeches as well as concerts may well be true but does not strengthen their position. Regulations that are content-neutral in imposing time, place, and manner restrictions are not unconstitutional under the circumstances of this case. *Renton* v. *Playtime Theatres, Inc.*, supra, 931. Both of these claims are in substance no different from the claim that the defendants raise on their own behalf and therefore do not create standing to mount an overbreadth challenge. See *Members of the City Council of Los Angeles* v. *Taxpayers for Vincent*, supra, 802. In the absence of a demonstrated danger that the regulation will significantly impinge upon the first amendment rights of those not before the court, the defendants have no standing to press a claim of overbreadth.[5]

II

The defendants also contend that Shelton's zoning regulations violate the Connecticut constitution. They argue that even if the United States constitution does not guarantee their right to hold rock concerts in residential areas, the state constitution does. We need not address the merits of this claim because the defendants lack standing to demand relief under the state constitution.

[5] The defendants also claim that the Shelton zoning regulations and the zoning board's enforcement order are impermissibly vague in excluding outdoor entertainment from residential districts. Judge Glass found, in the defendants' original appeal from the order of the zoning board of appeals, that the regulations and the order were not vague. We denied the defendants' petition for certification of their appeal from this judgment. The defendants cannot now collaterally challenge Judge Glass's findings. See *Corey* v. *Avco-Lycoming Division*, 163 Conn. 309, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116, 93 S. Ct. 903, 34 L. Ed. 2d 699 (1973); *Brockett* v. *Jensen*, 154 Conn. 328, 337, 225 A.2d 190 (1966).

Article first, §§ 4[6] and 5[7] of the Connecticut constitution set out state protections of free speech. While it is well settled that provisions of our state constitution may be construed to provide greater protection of rights the United States constitution affords; see *Cologne* v. *Westfarms Associates*, 192 Conn. 48, 56–58, 469 A.2d 1201 (1984); *Horton* v. *Meskill*, 172 Conn. 615, 641–42, 376 A.2d 359 (1977); it is equally well established that a litigant may challenge the validity of a statute or ordinance under the Connecticut constitution only as it has been applied to him. He may not claim that the provision is invalid because it impermissibly impinges upon the constitutional rights of others. *Southern Connecticut Gas Co.* v. *Housing Authority of New Haven*, 191 Conn. 514, 522, 468 A.2d 574 (1983); *General Electric Supply Co.* v. *Southern New England Telephone Co.*, 185 Conn. 583, 593, 441 A.2d 581 (1981); *Burritt Mutual Savings Bank* v. *Tucker*, 183 Conn. 369, 379, 439 A.2d 396 (1981); *Mystic Marinelife Aquarium, Inc.* v. *Gill*, 175 Conn 483, 494–95, 400 A.2d 726 (1978); *Silverman* v. *St. Joseph's Hospital*, 168 Conn. 160, 171–72, 363 A.2d 22 (1975); see also *State* v. *Sinchuk*, 96 Conn. 605, 615, 115 A.2d 33 (1921).

Our inquiry is therefore limited to a determination of whether the application of Shelton's zoning regulations to Pinecrest violated article first, §§ 4 and 5. In order to sustain such an attack under the Connecticut constitution, the defendants must establish beyond a reasonable doubt that the regulations deny them their rights guaranteed by article first, §§ 4 and 5. See, e.g., *Weil* v. *Miller*, 185 Conn. 495, 501, 441 A.2d 142 (1981); *Gentile* v. *Altermatt*, 169 Conn. 267, 307, 363 A.2d 1

[6] The constitution of Connecticut, article first, § 4 provides: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."

[7] The constitution of Connecticut, article first, § 5 provides: "No law shall ever be passed to curtail or restrain the liberty of speech or of the press."

(1975), appeal dismissed, 423 U.S. 1041, 96 S. Ct. 763, 46 L. Ed. 2d 631 (1976); *Roundhouse Construction Corporation* v. *Telesco Masons Supplies Co.*, 168 Conn. 371, 385, 362 A.2d 778, vacated, 423 U.S. 809, 96 S. Ct. 20, 46 L. Ed. 2d 29 (1975), on remand, 170 Conn. 155, 365 A.2d 393, cert. denied, 429 U.S. 889, 97 S. Ct. 246, 50 L. Ed. 2d 172 (1976); *Lublin* v. *Brown*, 168 Conn. 212, 219–20, 362 A.2d 769 (1975); *Kellems* v. *Brown*, 163 Conn. 478, 486, 313 A.2d 53 (1972), appeal dismissed, 409 U.S. 1099, 93 S. Ct. 911, 34 L. Ed. 2d 678 (1973); *Adams* v. *Rubinow*, 157 Conn. 150, 152–53, 251 A.2d 49 (1968); *Hardware Mutual Casualty Co.* v. *Premo*, 153 Conn. 465, 471, 217 A.2d 698 (1966).

In this case, the defendants have failed to show a denial of their own constitutional rights because they have not exhausted the administrative remedies available to them under the Shelton zoning plan. There is nothing in the record to indicate that the defendants have attempted to gain permission to hold concerts as an accessory use to the Pinecrest property or to any other property in town. The defendants have also failed to seek a variance that would allow them to present outdoor entertainment. The fact that the defendants have raised state constitutional issues does not give them the right to bypass the zoning procedures of the city of Shelton. See *Beit Havurah* v. *Zoning Board of Appeals*, 177 Conn. 440, 446, 418 A.2d 82 (1979); *West Hartford Methodist Church* v. *Zoning Board of Appeals*, 143 Conn. 263, 268, 121 A.2d 640 (1956). Until the defendants have exhausted these procedures, they cannot claim that the city has denied their right of free speech under the state constitution. We therefore do not reach the merits of their state claim.

There is no error.

In this opinion the other judges concurred.

Decision of the Superior Court (December 31, 1984)

CV 80-00653S

LOUIS HUSTI, ET ALS
: SUPERIOR COURT

VS.
: JUDICIAL DISTRICT OF
ANSONIA-MILFORD

ZUCKERMAN PROPERTY
ENTERPRISES, ET ALS : AT MILFORD

: DECEMBER 31, 1984

MEMORANDUM OF DECISION

Procedural History:

The Plaintiffs are the Planning & Zoning Commission of the City of Shelton and Richard Schultz, its duly appointed Zoning Enforcement Officer. The Defendants own and control certain property located in the City of Shelton in an R-1 residence zone. The property is subject to certain non-conforming uses. In May of 1979, the then Zoning Enforcement Officer issued an order to the defendants to wit: "You are hereby ordered to cease the use of the property for concerts and theatrical performances and to take such action as may be necessary to cancel any scheduled performances or activities which would be in violation of the zoning regulations".

This order was appealed to the Zoning Board of Appeals where after a hearing it was affirmed. Appeal was then taken to the

Superior Court, which appeal after hearing was dismissed (Glass, J., Docket No. 05259S, Superior Court, J/D Ansonia-Milford at Milford - Zuckerman Property Enterprises, Ltd., et al vs. Zoning Board of Appeals, City of Shelton) (City Exhibit B in this action). This action has been brought by the Plaintiffs to enforce the original order of the Zoning Enforcement Officer through means of an injunction against the Defendants, pursuant to Section 8-12 of the General Statutes. The Defendants subsequently filed several special defenses and at the time of trial filed a Motion for a Permanent Injunction on the ground that Shelton's blanket exclusion of outdoor musical entertainment violated the First Amendment to the United States Constitution as articulated in "*Schad vs. Borough of Mt. Ephraim*, 452 U.S. 61, 101 SCT 2176 (1981) as well as under Article 1, Sections 4 and 5 of the Connecticut Constitution. Apart from the constitutional issues thus raised, the other issues set forth in the special defenses were effectively abandoned by the Defendants at the time of trial.

During the pendency of this action this Court has issued a temporary injunction restraining the Defendants from using the property described in the Complaint "for concerts and theatrical performances". Also during the pendency of this action and prior to the actual trial of the case the Defendants commenced an action in the United States District Court for Connecticut seeking to enjoin the enforcement of the order of the Zoning Enforcement Officer. The United States District Court deferred to this Court on the ground of absention, pending the determination of the present case.

The Claim for Injunction by the Plaintiffs:

The provisions of Section 8-12 of the General Statutes authorize the Court to enforce zoning regulations by means of an injunction at the request of the proper zoning officials. The Plaintiffs need not establish irreparable injury or lack of an adequate remedy at law. See *Crabtree vs. Van Hise*, 464 ATL 2nd 865, 39 Conn. Sup. 334, *Johnson vs. Murzyn*, 469 ATL 2nd

1227, 1 Conn. App. 176, Cert denied 471 ATL 2nd 244, 192 Conn. 802.

The Court has examined the entire record of the original zoning appeal as well as the procedural history of this case and would conclude on the facts of this case that the only reasonable conclusion, apart from the constitutional issue hereinafter discussed is that the Plaintiffs are, in equity, entitled to an injunction. *Johnson vs. Murzyn* 1 Conn. App. 176, 183.

The Constitutional Issues:

The question is whether the constitutional issues raised by the Defendants require the denial of an injunction to the Plaintiffs and an issuance of an injunction to the Defendants to stay the enforcement of the Zoning Enforcement Officer's order. The Defendants raise Federal and State constitutional issues.

The Federal Constitutional Issue:

In *Schad vs. Borough of Mt. Ephraim*, 452 US 61,101 SCT 2176 (1981) the United States Supreme Court reversed a criminal conviction for the violation of a zoning ordinance which conviction rose out of the introduction of a coin operated mechanism permitting the customer in an adult bookstore to watch a live dancer, usually nude, perform behind a glass panel. The ordinance was challenged on constitutional grounds. As construed by the New Jersey Courts, "live entertainment", including nude dancing, was "not a permitted use in any establishment in the Borough of Mt. Ephraim" (p. 2181)*. In that case, "because appellants claims (were) rooted in the first amendment, they (were) entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own." (p.2181)*. The majority of the Court held that the ordinance was defective because it was overbroad and therefore set aside the convictions. There were concurring opinions by Justice Stevens, Blackmun and Powell with whom Justice Stuart con-

* of 101 SCT

curred. There was dissenting opinion by Justice Burger in which Justice Rehnquist joined.

The first issue to be considered is the question of "standing". The property of the Defendants in this case is located in a residential zone. The activity that they seek to carry out is a commercial activity. Certain commercial activities are permitted to the Defendants as a result of their rights to certain nonconforming uses in the residence zone, but the activities sought to be enjoined have been previously determined not to be within the scope of non-conformity.

Under traditional approaches, a litigant only has standing to vindicate his own constitutional rights. *Members of the City Council of the City of Los Angeles, Et al vs. Taxpayers for Vincent, Et al*, U.S.L.W., May 15, 1984, page 594. An exception to the rule is recognized where the laws are so broadly written that they inhibit the constitutionally protected speech of third parties. *Members of City Council, id*, page 4597. See also *Schad*, supra, p. 2181.

In order to decide whether the overbreadth exception is applicable in a particular case the Supreme Court has weighed the likelihood that the statute's very existence will inhibit free expression. *Members of City Council, etc, vs. Taxpayers, etc.*, supra, p. 4597. "There must be a realistic danger that the statute itself will significantly compromise recognized first amendment protection of parties not before the Court." (Members, id, p. 4598). Before the Court can apply the "facially overbreadth test" as an initial premise, the Defendants must demonstrate a realistic danger that the zoning regulation as written will significantly compromise recognized first amendment protections of individuals not before the Court. (Members, id p. 4598).

If the Defendants do not establish this realistic danger the Defendants challenge is limited to the effect of the zoning regulation on their own activity. In either event an analysis of the Shelton zoning regulation is required.

The power of any Connecticut municipality, including Shelton, is derived from Chapter 125 of the General Statutes. Zoning Commissions are authorized by statute to adopt regulations to, *inter alia*, "promote the general welfare", "lessen congestion in the streets" and "with reasonable consideration of any district as to its peculiar suitability for particular uses". (Section 8-2). The zoning statutes provide for adoption of regulations, change of zone and change of regulations, notice and appeal. The statutes provide a mechanism for variances and for written petitions requesting changes in the regulations and require that petitions be subject to a public hearing which must be held within 65 days after application and decided within 65 days thereafter. Generally, see Sections 8-3, 8-6, 8-7, 8-8 and 8-7d(a). Various enforcement remedies are available under Section 8-12 which together with Section 8-7 provide for notice and appeal of any orders which may be issued. In general, the enforcement of an order is stayed pending an appeal except as otherwise provided in Section 8-7. Criminal prosecution is stayed under the provisions of Section 8-12 if a civil challenge is pending which would decide the matter before the criminal court.

The Shelton Zoning code is of that type that is classified as permissive. See *Schwab v. Z.B.A.*, 154 Conn. 479, 481, 226A 2nd 506 (1967). That which is not permitted is prohibited. The Zoning Code, Schedule A, Exhibit , which lists those uses that are permitted including city uses and facilities in all zones (line 7) provides for non-profit schools, colleges, universities, educational, religious, philanthropic, literary, historical institutions in all zones (in some as special exceptions), for membership clubs, lodges, community houses, recreation facilities in some zones (in general see Uses 13 through 16); indoor theatres and assembly halls are permitted, subject to site plan review in certain zones, (line 30); hotels are permitted in certain commercial zones; accessory uses customary with and related to the permitted uses are specifically permitted under line #62.

There is a certain amount of latent ambiguity in the zoning code in that permitted uses are couched in general terms rather

than specific. For example, business and professional offices are permitted but the activity that may go on within those offices is left open to interpretation. Banks and financial institutions are permitted but the particular and peculiar activities which may go on within the bank or financial institution are not defined. An assembly hall or an indoor theatre is permitted but what may go on inside the assembly hall or indoor theatre is not otherwise defined.

As a result any Court must resolve the existing ambiguity in any given case.

Webster's Seventh Collegiate Dictionary defines theatre as: 1(b) a building for dramatic performances, (c) a building or arena for the showing of motion pictures, 2(b)...a room...for lectures, or other assemblies. "Theater": a structure used for dramatic, operatic, motion pictures, or other performances for admission to which entrance money is received and no audience participation or meal service is allowed. (*American Law of Zoning*, 2nd Ed., 1611).

In the absence of express definition, the meaning of a word or phrase in a zoning code is a question of law to be determined by the ordinary means of statutory construction.

A Court will undertake to resolve an ambiguity by selecting a construction which yields a fair and reasonable result. (*American Law of Zoning*, 2nd Ed., 1604)

The same may be said with regard to determining the criteria of those uses or activities which come under the definition of an accessory use. *Beit Havurah vs. ZBA*, 177 Conn. 440, *Lawrence vs. Zoning Board of Appeals*, 158 Conn. 509. In *Beit Havurah* the Supreme Court pointed out in the case of a church that "what constitutes a church has changed from a place of worship alone used once or twice a week to a church used during the entire week nights as well as days for various parochial and community functions".

Thus the Court, in view of these cases, would feel that if confronted with a question of whether "live entertainment" is permitted as an accessory use outdoors or indoors, at a City park or other facility, or at a school, college or university or in connection with a community house or recreation facility, the decision would be in favor of such an activity. See also an annotation at 11 ALR 2nd 1084. The testimony of the Zoning Enforcement Officer as well as the testimony of Chief Siraco introduced by the Defendants by means of a deposition indicates that live entertainment has occurred outdoors in the City of Shelton under the terms of the present City regulation.

This Court is therefore persuaded that a reasonable interpretation of the Shelton Zoning Code is that "live entertainment" is permitted indoors in theaters and assembly halls and as accessory uses in other situations and that , under a reasonable interpretation of the zoning regulation live entertainment could reasonably be permitted outdoors as an accessory use in connection with several of the primary uses set forth in the Zoning Code. Under this Court's interpretation of the regulation therefor, the defendants argument is reduced to a claim that the zoning code is defective because it does not specifically permit facilities for outdoor entertainment as a primary use. The City articulates grounds for the classification in the Zoning Code based upon the nature of the community and the proximity of the residential areas to all of the commercial areas. The City's contention is that there is a certain amount of noise and crowd activity which is indigenous to outside activity of any nature which, under the terms of the zoning code as it is drawn, permits the City to reasonably restrict this activity. The zoning maps and the testimony indicate that Shelton's zoning classifications to a large extent followed that which existed at the time that they came into effect and consequently there are a number of commercial areas immediately adjoining residential areas that include residences within them.

It is a matter immediately apparent, as a matter of experience, that outdoor facilities which would be used for live outdoor per-

formances as primary uses of any kind tend to create a greater noise and regulatory problems than do indoor performances.

There is no credible evidence to show that the adoption of the zoning code was in any way motivated by an attempt to regulate or to stifle any particular means of expression or free speech or any right protected by the first amendment. The Court is satisfied that in the adoption of the zoning regulations the City was concerned with the use of land and the regulation of land in such a way as to adequately and reasonably protect the community as it existed and was not directed at the content of a protected form of expression.

This Court concludes therefore that as construed herein, the existence of the zoning regulation does not pose a realistic danger that first amendment rights of individuals not before the Court would be compromised and that there is a substantial interference with any first amendment right. The Defendants would appear to have standing only to challenge the ordinance as it is applied to them.

However, this Court will not rest its decision on that ground alone. Assuming that the Defendants have standing, to stand in the shoes of third parties, the question is whether or not the statute is overbroad.

As outlined in the Defendants' memoranda and as set forth in the cases cited therein, the questions to be answered in such a determination where first amendment rights are involved are basically four: (a) Is the regulation content neutral? (b) Does the regulation further a substantial governmental interest? (c) Is it narrowly drawn and does it represent the least restrictive method of regulation? (d) Is it a valid time, place or manner restriction which leaves open adequate channels of communication? This regulation appears to the Court to be content neutral. Facilities for outdoor activities as primary uses are prohibited throughout the community without regard to content. The City has a substantial interest to regulate the activities that go on in the com-

munity and the right has been recognized in a variety of cases. See *Village of Euclid Ohio vs. Ambler Realty Co.*, 272 U.S. 365 (1926). See also *Schad*, supra, at p.2188. See *Berman vs. Parker*, 348 U.S. 26,32. The proper organization of the community, its peace and quiet, have long been recognized as substantial governmental interest. This Court believes that as a whole in the light of the applicable state statutes and the procedural safeguards involved the regulation is narrowly drawn and that any potential loss of communicative activity is minimal, if it exists at all and that the regulation is a valid time, place and manner restriction which leaves open adequate means of communication. As pointed out by Justice Blackmun (p.2185 of 101 Supreme Court) the subject matter of this case "involves a still emerging area of the law and those issues must be resolved on a case by case basis." Justices Powell and Stuart in their concurring opinion note that they would not say that "some communities are not free by a more carefully drawn ordinance to regulate or ban all commercial public entertainment". Justice Stevens in his concurring opinions states that "while a municipality need not persuade a federal court that its zoning decisions are correct as a matter of policy, when first amendment rights are implicated, it must at least be able to demonstrate that a uniform policy in fact exists and is applied in a content neutral fashion". This Court believes that the Shelton regulation is not facially overbroad.

As far as the defendants rights with regard to their property, per se, are concerned, the City of Shelton clearly has the right to classify particular portions of the community into particular zones. The Defendants concede that their property is located in a residence zone. While they point out that the residence zone borders other zones and other activities, this does not invalidate the zonal classification nor is there any substantial question but that a City has the right to exclude from a resident zone all forms of commercial activity. The Defendants have certain rights to non-conforming uses which have been honored by the City in the enforcement of its zoning regulations. The determination of the prior court proceedings that the activity sought to be enjoined

is beyond the scope of any existing nonconforming use is binding upon this court. The defendants advance the position that because their "concerts" triggered the action of the Zoning Enforcement Officer and the Zoning Commission in this case, that, as applied to them, the application of the zoning law is not content neutral. Here, however, the fact of the concerts themselves, not the content of them, create the violation which was the subject matter of the hearings before the Zoning Board of Appeals in the Courts below. The application to the activities of the Defendants premises is related to the improper extension of a non-conforming use and not to the content of that extension.

The Court concludes that the application of the zoning regulations under the circumstances of this case to the Defendants property is not unconstitutional.

The State Constitutional Issue:

On the issue of "standing", the Supreme Court has articulated its preference that a constitutional challenge to an entire zoning provision be made by means of a declaratory judgment action so as to permit notice and intervention of all parties. See *Bierman vs. Planning & Zoning Commission*, 185 Conn. 135. Constitutional challenges require that the persons challenging the legislation must shown that they are affected thereby. *Kuser vs. Orkis*, 169 Conn. 66, 74 (1975), *Shaskan vs. Waltham Industries Corp.*, 168 Conn. 43,48.

This Court concludes that the Defendants do not have standing to challenge the constitutionality of the ordinance as a whole, as opposed to its application to them. However, rather than to determine the matter on this narrow ground, the constitutional issues raised by the Defendants have been considered.

The Supreme Court has addressed the issue of commercial speech in the case of *Grievance Committee vs. Trantolo*, 192 Conn. 15, and 192 Conn. 27. The standard enunciated in those cases (at p.33 of 192 Conn. 27) is that the activity of the actor

must be a lawful activity, the governmental interest asserted must be substantial, and the government regulation must be narrowly drawn and must not be more extensive than is necessary to serve that interest. The regulation of activities in communities for the purpose of quiet enjoyment has long been recognized in Connecticut zoning cases.

While in a given case the Connecticut constitution may provide greater protection of individual liberty than does the federal constitution, the Supreme Court has recognized in *Horton vs. Meskill*, 172 Conn. 615 1977 that deference will be paid to federal interpretation when it provides no less individual protection than is guaranteed by Connecticut law.

Based upon the analysis set forth previously, this Court does not believe that the zoning code as applied violates the provisions of the Connecticut constitution.

Conclusion: For the reasons set forth herein, the Motion for a Permanent Injunction by the Defendants against the Plaintiffs is denied. The issues are found for the Plaintiffs on the Complaint and on the Counterclaim.

The Court has reviewed the Memorandum of Decision in Docket No. 05259S with specific regard to the Defendants claims that the Order of the Court is too vague to be complied with. An injunction shall issue under penalty of $5,000.00 ordering the Defendants to wholly and absolutely desist and refrain from use of the property described in the Complaint for concerts and theatrical performances, to wit: any public performance by an aggregation of musicians, singers and dancers performing in an open setting at the Pinecrest.

In the event of an Appeal the existing temporary injunction shall remain in full force and effect until further Order of the Court.

Rottman, J

Excerpts of Decision of the Superior Court (June 6, 1980)

NO. 05259 S

ZUCKERMAN PROPERTY
ENTERPRISES, LTD., ET AL :SUPERIOR COURT

VS.

:JUDICIAL DISTRICT OF
ANSONIA-MILFORD

ZONING BOARD OF APPEALS,
CITY OF SHELTON

:JUNE 6, 1980

MEMORANDUM OF DECISION

In this proceeding the plaintiffs appeal from a decision of the Zoning Board of Appeals of the City of Shelton upholding an order issued by Joseph E. Bienkowski, Zoning Enforcement Officer of the City of Shelton, dated May 21, 1979.

I.

Subsequent to the appeal, on March 11, 1980, the plaintiffs filed an application "for a restraining order staying proceedings upon the decision appealed from until such time as a final determinaton of the plaintiffs' Appeal has been made by this Court." At the time of the hearing on the show cause order issued in connection with the application the Court informed counsel for the plaintiffs and counsel for the defendant that in order to facilitate and expedite the matter that the Court would hear the evidence offered in regards to the application and the evidence relevant to the appeal at the same time, and since this was the procedure followed the Court has concluded that a decision rendered expeditiously on the merits of the appeal makes it unnecessary to consider the application for the restraining order.

II.

-A- The evidence shows that the plaintiff Zuckerman Properties Enterprises, Ltd., is a limited partnership organized under the laws of the State of Florida, with an office at 745 River Road, Shelton. In Zuckerman Properties Enterprises; Ltd., the limited partners are Robert Zuckerman, Jonathan Zuckerman, Edward Zuckerman, and Matthew Zuckerman; Blanche Zuckerman is a general partner in the business. Each partner owns a twenty per cent share of Zuckerman Properties Enterprises, Ltd., (hereinafter Zuckerman Properties).

Plaintiff Zuckerman Properties owns 25.8 acres of a 42 acre tract of land in the City of Shelton, the balance of the 42 acres is owned by Robert Zuckerman and Jonathan Zuckerman. Robert Zuckerman and Jonathan Zuckerman are individual plaintiffs in this matter.

The plaintiff First River Road Corporation, d/b/a Pinecrest Country Club (hereinafter Pinecrest), manages the property, collects the rents, pays the mortgage, the taxes and insurance on the property. Pinecrest operates two restaurants on the property that is involved in this proceeding; Pinecrest also operates all outdoor facilities on the property, including the band shell, a swimming pool, horseshoe pits, tennis courts, volley ball courts, a baseball field and several food and concession stands.

The plaintiff Shelton Yacht and Cabana Club, Inc., (hereinafter Yacht Club) operates a restaurant on the property and for this restaurant the Yacht Club holds a liquor license.

The plaintiff Lascal, Inc., is a corporation formed for the purpose of obtaining a liquor license in the future for the outdoor facilities at Pinecrest. At present Lascal, Inc., is not engaged in any business.

* * *

IV. Evidence adduced at the several hearings on this matter tends

to show that Blanche Zuckerman, mother of defendants Robert Zuckerman and Jonathan Zuckerman, and also a general partner in the plaintiff Zuckerman Properties, purchased the property known as Pinecrest in 1956. Blanche Zuckerman conveyed the property to Zuckerman Property Enterprises, Ltd., by deed dated January 22, 1974.

Under the Zoning Ordinance and Amendments thereto of the City of Shelton, effective June 9, 1952, Revised May 12, 1964 (hereinafter Zoning Ordinance), Pinecrest was located in a RU-1 (Rural District 1) zone. Currently in Shelton zoning is controlled by Zoning Regulations of the City of Shelton (hereinafter Zoning Regulations) and the subject property is now in a R-1 (Residential 1) zone.

The property was acquired by Blanche Zuckerman from a church and at the time, and for several years prior thereto, it was used as a summer camp for children. Initially, according to Mrs. Zuckerman: "I made it as a country club for . . . not for members . . . but for people who belong to organizations, for dinner parties, outings, in fact we did all of the high school proms there." Zoning Board of Appeals Transcript, p. 340. This initial undertaking for the use of the property was unsuccessful and according to Mrs. Zuckerman, although music was not a part of the use of the property when it was used as a summer camp for children, around 1958 she commenced to seek patrons from all over Connecticut and the New York area for dinner parties, dance parties, weddings, picnics and other outings, and at this time she began to have live and recorded music in connection with these affairs. The music was amplified and sent through speakers located on poles and trees on the premises. She continued to manage and operate Pinecrest in this manner until about 1968, at which time she leased the property, and the lessee continued to operate Pinecrest in the same manner as Mrs. Zuckeman that is, as a place for public and private affairs and recreational activities. In 1970 the possesion of Pinecrest was returned to Mrs. Zuckerman, and in 1974 she conveyed the property to Zuckerman Property Enterprises, Ltd. In 1970 the management and

operation of Pinecrest was taken over by the defendants Robert Zuckerman and Jonathan Zuckerman. The evidence shows that Pinecrest has added several restaurants to its facilities, it can now accommodate large banquets, testimonials, weddings, dinner parties and indoor and outdoor dances. Additional recreational facilities have been included and expanded, such as tennis courts, volley ball courts, shuffle ball, ping pong, horse shoe pits, and other similar recreational activities. Initially there was a pond on the property for summer camp swimming, this however, has been altered, reconstructed, and replaced with a swimming pool that is now advertised as the largest swimming pool in Connecticut.

The new management of Pinecrest continued to enlarge and improve the entertainment and facilities of Pinecrest and in 1975 the management decided to undertake to provide entertainment that the management considered would attract and meet the desires of many young people for contemporary music, considered primarily to be the so called hard rock music. Pursuant to this decision, a promoter of entertainment was engaged to provide Pinecrest with live, reputable entertainment for the summer seasons. The first big concert or musical event to be performed at Pinecrest under this new approach to entertainment was held on August 31, 1975. The evidence shows that from April 1, 1975 through August 31, 1975, six concerts or musical events were performed at Pinecrest; from June 13, 1976 through October 3, 1976, eight concerts or musical events were performed; there were eleven concerts or musical events in 1977; from May 7, 1978 through September 24, 1978, there were eleven concerts or musical events performed; and from May 6, 1979 through September 16, 1979, there were eighteen musical events or concerts held at Pinecrest.

* * *

The Planning and Zoning Commission of Shelton at a special meeting on April 20, 1979, concluded that:

> "The position of Zoning Commission based upon Mrs. Zuckerman's affidavit, is that the property referred to is subject to an existing nonconforming use for picnics and outings only, and does not include concerts or other activities and uses listed in PA 78-202; said activities not being permitted by the current zoning and in violation of Section 41.4 of the zoning regulations."

On May 21, 1979, the Zoning Enforcement Officer issued an Order to the defendants that: "You are hereby ordered to cease the use of the property for concerts and theatrical performances and to take such action as may be necessary to cancel any scheduled performances or activities which would be in violation of the Zoning Regulations."

The plaintiffs appealed this Order to the Zoning Board of Appeals, and after a hearing consisting of five public sessions the Board rendered a decision on December 18, 1979, upholding the order to the Zoning Enforcement Officer. The plaintiffs appeal from the action of the Board, claiming that the Board acted illegally, arbitrarily and in abuse of the discretion vested in the Board.

V.

At the threshold the plaintiffs make a claim that the order of the Zoning Enforcement Officer is void and unenforceable, asserting in substance that the terms "picnic," "outing," "concert," and "theatrical performance" are all unclear and ambiguous, and the order and zoning regulations on which it is predated are devoid of any ascertainable standards to enable the plaintiffs to determine with specificity the conduct prohibited under the order.

The plaintiffs contend that musical entertainment has been presented at Pinecrest since 1957, and since the Planning and Zoning Commission has authorized the continuation of picnics

and outings as legitimate nonconforming uses at Pinecrest, the question is raised by the plaintiffs if a picnic or outing attended by 10,000 people gathered at Pinecrest to enjoy the pool, the tennis courts and the food, whether their activities would become a concert or theatrical performance if someone brought along and played a guitar or a radio. The question is not only hypothetical, but it is not based on the facts of this case.

Credible evidence shows that the Zoning Enforcement Officer's order is directed against an activity that is advertised and publicized as a "concert," see exhibit #18 labeled "Pinecrest Concerts on the Lawn --- 1979," and the Pinecrest Letterheads which shows that "concert facilities" are available at Pinecrest. Moreover, pursuant to the advertisement and publicity of concerts being presented at Pinecrest, thousands of people come to the scheduled advertised event, purchase tickets, are admitted to the Pinecrest premises, many carrying blankets and folding chairs, then directed to a large area where is located a large band stand equipped with large amplifiers and speakers, and unless the advertisement, publicity, ticket sales and physical arrangements are all fraudulent and under false pretenses, when the entertainers appear and perform, the Zoning Board of Appeals could reasonably conclude that the presentation is in fact what it purports to be, a "concert." It would not be unreasonable for the Board to conclude that the thousands of people attracted to Pinecrest for these events under the circumstances disclosed by this evidence are there to be entertained, rather than to entertain as suggested by plaintiffs' question.

Plaintiffs' letterhead list several activities that Pinecrest either provides or has facilities to accommodate, included are "outings," "picnics," "dances," "outdoor dancing pavilion," "indoor dancing," and "concert facilities." At the Board hearing the Zoning Enforcement Officer testified that the term "concert" and the phrase "theatrical performance" were used interchangably. *Webster's New Collegiate Dictionary* defines concert to include: "A public performance of music or dancing, especially a performance usually by a group of musicians (as a

chorus, band, or orchestra) that is made up of several individual compositions not joined in an integrated whole." When this definition of "concert" is considered with the basic rule that a word should be given its ordinary common sense meaning, it is clear that on the facts of this case the term "concert" as used by the plaintiffs, "Pinecrest Concerts on the Lawn . . . . 1979," and by the Zoning Enforcement Officer in his order, all refer to a public performance by an aggregation of musicians, singers and dancers, all performing in an open setting at Pinecrest. Furthermore, the plantiffs are hardly in a position to claim that the term concert is so ambiguous and vague that they are uncertain as to what musical performance is permitted at Pinecrest, particularly since they make a distinction in their advertisements between concert facilities and other facilities and activities at Pinecrest. The order seeks a cessation of the musical events that started in 1975 in a residential zone in Shelton when six concerts were presented; in 1976, eight concerts; in 1977, eleven concerts; in 1978, eleven concerts; and in 1979, eighteen concerts that were performed at Pinecrest. Moreover, the validity of the order must be tested by its effect on its attacker under the particular facts of the attacker's case. *Riley v. Liquor Control Commission*, 153 Conn. 242, 247. The unconstitutionality claim is rejected, the plaintiffs have failed in their proof on this issue.

VI.

Plaintiffs contend that the zoning regulations controlling the determination of this matter were enacted August 5, 1966, at which time the Shelton Zoning Regulations were updated, revised and provided with greater specificity than the zoning ordinance that became effective on June 9, 1952. The dispositive question is whether the musical events presented since 1975 and characterized as concerts are so similar to the musical events presented since 1957 to 1975 as to be considered the same or no more than an intensification of the musical entertainment started in 1957. If the musical events presented since 1975 are the same or not more than an intensification of the 1957 musical entertainment, the musical events beginning in 1975 are protected as

pre-existing nonconforming uses. The Board has concluded that the musical events presented since 1975 are new uses at Pinecrest. If the Board had before it credible evidence to support its conclusion it would be inappropriate for this Court to substitute its judgment for that of the Board on the matter.

* * *

...This Court has been unable to find any Connecticut Supreme Court decision that has granted unrestricted growth and unlimited intensification of nonconforming uses. In fact the basis for restriction against enlargements and extensions of nonconforming uses is reflected by the words of the Court in *Beerwurt v. Zoning Board of Appeals of Town of Coventry*, 144 Conn. 731, where the Court stated:

> "Viewed in terms of widest legislative intent, the purpose of zoning ordinances ..... is to confine certain classes of buildings and uses to certain localities. So far as a nonconforming use is inconsistent with this objective, the nonconforming use should, consistently with the property of the individuals affected and substantial justice, be reduced to conformity as quickly as possible" Id. at 733.

* * *

In its decision rendered on December 18, 1979, upholding the order of the Zoning Enforcement Officer, the Board stated:

> "The Board finds the issues in favor of the Zoning Enforcement Officer of the City of Shelton, the appellee and against the appellants and hereby wholly affirms the order appealed from.
>
> The reasons for this decision are set forth in the following paragraphs:

1. The earliest zoning regulations which are relative to these inquiries were adopted on August 5, 1952. Under the 1952 regulations the land in question was in RU 2 Zone (Rural District). In 1952 the land was not owned by any of the appellants but by others and was used as a summer camp. In 1957 Blanche Zuckerman, the mother of some of the appellants in this proceeding, purchased the subject property and commenced the business now operated on said property. At no time were the uses which are under appeal permitted under the 1952 ordinance or any amendments or by any variance or nonconforming use demonstrated in this proceeding.

2. Effective August 5, 1966 zoning regulations, different in part from the 1952 ordinance, were adopted by the Shelton Planning and Zoning Commission. The subject premises was in a R1 Zone. At no time were the uses which are under appeal permitted under the 1966 regulation including any amendments to the date of this decision.

3. The uses which are the subject of the cease and desist order of May 21, 1979 were new uses commenced subsequent to 1974."

The Order prohibited concerts and theatrical performances at Pinecrest, the Board found these events to be new uses at Pinecrest and not nonconforming protected uses. The testimony and exhibits before the Board fully support its decision. Although controversial, there is ample credible evidence in the record to show that the musical events presented at Pinecrest since 1975 are sharply different from the musical events presented prior to 1975, the former being advertised, publicized and characterized as concerts, wherein the latter, was never presented nor considered as such. Resolution of the controversial evidence is properly left to the Zoning Board of Appeals. Plaintiffs have failed to prove that the decision of the Board upholding the order of the

Zoning Enforcement Officer was illegal, arbitrary or an abuse of its discretion. Compare *Planning and Zoning Commission v. Zemel Bros., Inc.*, 29 Conn. Sup. 24, involving an application for a temporary injunction, seeking to enjoin a three day music or rock festival in Middlefield.

The Appeal is dismissed.

ROBERT D. GLASS, J.

No. CV 80-00653S

LOUIS HUSTI, ET ALS	: SUPERIOR COURT
VS.	: JUDICIAL DISTRICT OF ANSONIA-MILFORD
ZUCKERMAN PROPERTY ENTERPRISES, ET ALS	: AT MILFORD

DECEMBER 31, 1984

JUDGMENT

This action, by writ and complaint, claiming injunctive relief came to this Court on July 15, 1980, and thence to the present time when the parties appeared and were at issue as on file.

The Court, having heard the parties, finds the issues for the plaintiffs on the complaint and on the counter-claim.

Whereupon, it is adjudged and decreed that the defendants are commanded and enjoined and each of their officers, servants, agents, and/or employees are enjoined to wholly and absolutely desist and refrain from the use of the property described in the complaint for concerts and theatrical performances, to wit: Any public performance by an agregation of musicians, singers, and dancers performing in an open setting at the Pinecrest, under penalty of Five Thousand ($5,000.) Dollars.

It is further adjudged that the plaintiffs shall recover of the defendants costs taxed at $140.00.

By the Court Rottman, J.

:NO 12689

IN THE SUPREME COURT OF THE
STATE OF CONNECTICUT

LOUIS HUSTI, ET ALS:

APPELLEES:

V.

ZUCKERMAN PROPERTY ENTERPRISES
LTD. ET ALS, d/b/a PINECREST COUNTRY CLUB:

APPELLANTS:

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Zuckerman Property Enterprises, Ltd., d/b/a Pinecrest Country Club, the appellant above-named hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Connecticut affirming the City of Shelton's complaint enjoining defendants from using their property for any outdoor entertainment and dismissing defendants counterclaim based on First Amendment grounds, entered in this action on May 13, 1986.

This appeal is taken pursuant to 28 U.S.C. 1257 (2).

DEFENDANTS-APPELLANTS PINECREST COUNTRY CLUB

/s/ALAN NEIGHER
1804 Post Road East
Westport, CT 06880
203/259-0599

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of July 1986, a copy of the Notice of Appeal to the Supreme Court of the United States was mailed, postage prepaid, to John H. Welch, Jr., Esq. and Jean Maguire, Esq., Winnick, Vine & Welch, 6 Huntington Street, Shelton, CT 06484. I further certify that all parties required to be served have been served.

/s/ALAN NEIGHER

Counsel for Defendants-Appellants

Excerpts of Testimony of Shelton City Officials

EXCERPTS OF DEPOSITION TESTIMONY OF EUGENE M. HOPE, JR. MAYOR (JANUARY 24, 1983)

Q What's here in Shelton?

A You want to talk industry or commerce?

Q Industry. Heavy -- . . .

A Downtown: Industry, most of it I would categorize as old established machine-type industry. Okay? Factory type as opposed to right over here (indicating) near route 8 with which I know you're familiar. A whole group of new industries which are all high tech. We have ITT. We have TIE. The corporate headquarters of Tetley Tea. We have a research center of Richardson-Vicks. We have Richardson Design Center for Phillips Medical. These are what we call "high tech" as opposed to people putting together things with machines or assembly work. Okay?

Down on the River Road area, which gets us back to your client's property, we have a variety of what I would categorize as relatively small industrial operations. Two or three of them directly across the street, so to speak, from your clients' premises...

* * *

Q We're talking about the River Road area going north on 110 from the Parkway?

A Yes.

(pp 17-18)

* * *

Q . . . Going up on 110, what is there on 110, on the right-hand side going north? . . .

A Well, there's three or four what I call small or medium-size places. One is called American Specialty.

Q They manufacture?

A I'm not sure. One is called Frigitronics. There's another one -- I just can't put a name to it at the moment. There's at least three on the road I can think of offhand. There was a place called Sorge's Welding. I'm not sure if they're still there. That's on the right. But I'm not sure if they're still there.

Q Everready Machinery Company?

A Everready is one of the ones I could not put a name to. Right. . .

(p. 19)

* * *

Q Okay. That would be on the eastern side of Route 110 going north?

A On the water side, right.

Q What's on the left side?

A Okay. Let's start down at the border, again. We have Esther's Hacienda. We come up and -

Q Esther's is a restaurant?

A Yes. Right. You come up a few hundred feet and there's a little -- you can't call it a shopping mall because it's been there for years. But there's a gas station, and there's a little grocery store. I think there's a real estate office. There used to be a barber shop. I'm not sure if it's still there. There's a package store and on the corner, right on the corner of Long Hill Avenue, there's a hot dog stand or restaurant. Whatever you want to call it. And the reason I'm not categorizing this as a shopping center is they're not a group of connecting buildings. Some of them have been there -- one of them is a little house, as a matter of fact.

Q This is south of Pinecrest?

A Yes.

Q Still south?

A On the same side of the street. Then, as soon as you cross Long Hill Avenue -

Q How close to Pinecrest?

A Half a mile . . .

(pp. 20-21)

* * *

Q After Pinecrest, north of Pinecrest on 110, is there any commercial business on -

A Yes. But it's up substantially -- okay. Guessing again, I would say that from the northern extremity of your clients' property to the next commercial development would be a mile. That's a pure guess.

Q All right.

A Then, again, it's -- and we're still on the left side of the road, there's a restaurant right on the corner of Rocky Rest Road and 110. And there's a restaurant which changed hands for the fourth or fifth time called Traney's (phonetic). It opened a month ago. Next to them is a bus barn. Country Day Bus Company, I think that's their name, which buses all of the students in Shelton, where they keep their buses. Next to them is an auto repair garage. Next to them is a little fruit market which I think is opened on weekends where they sell apples. And I think that after that there are some open fields and houses.

There is, then, a very small - still on the left - what I would call a mini shopping center. It has a Cumberland Farms. It has a package store. It has an insurance agency and it has a little shop on the end. . .

(pp. 21-22)

* * *

Q Okay. Is it fair to say, there's residential housing within a mile or so from Pincrest?

A Primarily.

Q And there's some light industry?

A Yes.

Q And there's some retail commercial retail establishments?

A Within a mile?

Q Yes.

A (No response)

Q Esther's?

A Within a mile going south, yes. It might be a mile and a half going north. Okay? I'm just giving you my best judgment. I'm trying to visualize it.

Q . . . Are there any other types of business we haven't touched on located with a mile radius?

A There's boat yard. It's on the right side, too. It's fair to say it's within a mile of your client's property. . .

(pp. 27-28)

* * *

Q How many theaters are there in Shelton?

A Theaters?

Q Private theaters?

A We used to have one.

Q I've heard. But it's no longer in operation?

A As a furniture store now. If I'm correct.

Q There's no other movie houses in Shelton?

A Not that I'm aware of.

Q All right. Are there any indoor auditoriums in Shelton for seating where events could be staged? Dramatic, musicals -

A Yes There are. We have two good-sized ones in the Shelton Intermediate School which used to be the high school and the other in Shelton High School. We also have auditoriums in Long Hill Grammar School. . .

(p. 28)

* * *

Q Except for Pinecrest and excepting also the plays that have been held at Shelton High School -

A Yes.

Q -- from your memory -

A Uh huh.

Q --has the City had any experience with any outdoor concerts or indoor concerts of any kind?

A Not that I recall.

(p. 31)

* * *

Q Mr. Mayor, with respect to the various complaints that you

got, complaints about parking and littering and a little vandalism, some indecent activity by people going back to their cars and plus noise, I take it that complaints were addressed not to every concert but to certain concerts? Is that correct?

A I would imagine there were probably some concerts where there weren't any complaints. Okay? I could be wrong on that point but I would imagine there were some where there weren't any. And there were some when we were literally deluged. . .

(p. 38)

* * *

Q I'm going to hand you a copy of Plaintiffs' Exhibit 2 for Identification, which is a Temporary Injunction issued by the Superior Court at Milford which on its face orders the plaintiff in this action, essentially Pinecrest, to wholly and absolutely desist and refrain from the use of the property known as Pinecrest Country Club for concerts and theatrical performances, okay? Have you ever seen that document before, Mr. Mayor?

A I would imagine so.

Q Okay. Now, do you have any knowledge or do you know what the terms concerts and theatrical performances means?

A My interpretation?

Q Yes.

A Yes. Specifically concerts or other musical events of any outdoor nature.

Q That would include all musical events of an outdoor nature?

A Yes. That is my interpretation thereof. If I understand the intent correctly.

Q Okay, but is there any question as to what the intent was of the City of Shelton?

A Not as far as I'm concerned. If I interpret it correctly, the intent was to stop concerts and other musical events.

Q At Pinecrest?

A Uh huh.

Q All right. Now, I take it that the intent was not to limit the prohibition to rock concerts? Rock concerts only?

A Not as far as I am concerned. A concert is a concert.

Q I take it the intent was not to limit the prohibition to musical events where admission is charged?

A You mean as opposed to a free one?

Q Yes.

A Okay. Again, my interpretation is the intent was a total prohibition of concerts, musical events, whatever you want to call them, outdoors, regardless of fee or no fee.

Q Okay. I take it, then, that your interpretation would include non-rock events such as folk music?

A My interpretation is that way, yes. I can clarify as to why it is that way if you wish. Or maybe you don't care.

Q I do want to know that but it would also include opera, would it not?

A It certainly would.

Q And jazz, Dixieland music?

A Uh huh.

Q Or musical comedy?

A Yes. What do you mean by musical comedy.

Q A play like the King and I.

A Yes. I would presume so. All of this relating to outdoors.

Q Okay. Fine. Now, you were about to say, I didn't want to stop you from saying it, why the prohibition is the way you interpret it.

A Oh. The reason I interpret it this way is because at a point in time, for instance when we were talking about concerts, Mr. Zuckerman conveniently started to change the name and call it a musical event. And called a couple of them picnics with music.

The intent is not to have concerts, whatever. Regardless of what name you call them by, whether they're symphonic or rock or jazz or Dixieland. My belief as to what was the purpose here was to say you cannot have any musical event outdoors.

Q Now, from your experience -

A No matter what you call them.

(pp. 57-59)

* * *

Q Now, you testified earlier that not all of the events, rock or otherwise, that were held at Pinecrest did cause problems?

A That is correct.

Q But the events that did cause the problem involved the live performance of music?

A Yes.

Q Is it fair to say, that the events that did cause a problem were rock music events?

A Yes.

Q It would? Okay. And as "rock" what I'm talking about is rock as we hear it performed over the radio.

A Yes.

Q With high decibel levels?

A Precisely.

Q Has there ever been a problem at Pinecrest, to your knowledge, resulting from any other kinds of musical events? For example, a folk concert?

A Of my own knowledge, I don't know if they ever had a folk concert.

Q Okay. But is it fair to say, that the only problems or the only events that have caused problems for the City of Shelton have been from rock music live outdoor performances?

A The ones of which I am aware. Yes, sir.

(pp. 60-61)

* * *

Q So, again, is it fair to say, that not every rock event held at Pinecrest caused such problems?

A That is correct.

(p. 61)

* * *

Q . . .Now, putting aside Pinecrest, since 1979, have there been any outdoor musical events in Shelton since the summer of 1979?

A Parades.

Q Parades?

A Yes.

Q All right. Any sit-down musical events? I'm sorry. Any events, localized areas, where people sat down and listened to music or concerts or theatrical performances outside of Pincrest since 1979?

A Not that I recall.

(p. 63)

* * *

Q . . . With respect to rock concerts at Pinecrest, has the City of Shelton ever done any studies or do you have any written data on limiting the size on audiences?

A . . . I don't think so. I don't think so.

(p. 65)

* * *

Q Have you done any studies with respect to improving or eliminating problems with respect to traffic flow resulting from rock concerts at Pinecrest?

A I think so. I indicated the attempts to initiate no parking with State approval on the state highway.

Q But, you had no expert studies?

A No. No. We have not conducted any expert studies on it.

(p. 66)

* * *

EXCERPTS OF DEPOSITION TESTIMONY OF FRANK OSAK, JR., CHAIRMAN OF THE PLANNING AND ZONING COMMISSION (JANUARY 31, 1983)

Q [Questions as to reasons why the Shelton Planning & Zoning Commission issued its decision of April 20, 1979]

A . . . you know there was an awful lot of community pressure on the issue which you could appreciate in a small town.

Q Yes.

A You know, we do have a lot of access to people on the streets and every place else and at our meetings.

(p. 22)

* * *

Q . . . The problem as your Commission saw it was the crowds and the noise and the parking?

A Right.

Q Those were primary?

A That's right.

Q All right. And I take it that the solution to the problem, as you saw it, was to preclude, except for picnics and outings, any other use of Pinecrest's outdoor facilities?

A Yes. Any other use that were not a part of the existing nonconformity that was there before the adoption of the zoning regulations; yes.

(p. 26-27)

* * *

Q I take it the Commission didn't actively consider limiting the size of the audiences?

A No.

Q The Commission didn't consider limiting the number of cars that could be parked in the area?

A Not to my knowledge. . .

Q I take it you consider it beyond the powers of the Shelton P & Z to get into issues like limiting crowds?

A That's not in the regulation.

(pp. 28-29)

* * *

Q Now, to your knowledge, is there any provision in the permitted uses for any zone in Shelton for outdoor entertainment or concerts of any kind.

A To my knowledge, no.

Q Well, if someone wanted to have a concert in Shelton-

A Uh huh.

Q --any kind of concert, let's say a military band, outdoors, and sell tickets to the public-

A Uh huh.

Q --what would one have to do to put that performance on?

A Well, if it were an indoor auditiorium it probably would be permitted. Now, as indoor theater, that type of thing.

Q There aren't any theaters in Shelton anymore?

A Not anymore, no. Other than the school auditioriums that have theaters.

Q How about outdoors?

A Not to my knowledge. There are no theaters on the outdoors. . .

(pp. 30-31)

* * *

Q Right now, since the closing of that place on Plain Street, I take it there are no indoor theaters in Shelton?

A Not to my knowledge.

Q How about assembly halls?

A School assembly halls, church assembly halls. I think there's dance studio on Old Route 8 that might qualify as an assembly hall. That type of thing.

Q Okay. Now, if someone wanted to put on a concert of military music outdoor in Shelton - there are not amphitheaters

outdoors, I take it - would a person be able to do that under existing zoning laws?

A I would say, no.

Q Why not?

A I would say because it's not permitted in Schedule A.

Q I see. Okay. And that would go for any kind of music? You don't differentiate between -

A That's correct.

Q Okay, I see. If a person wanted to put on that concert and get special permission to do it what would that person have to do?

A Well, there would be a couple of remedies. One would be to explore an amendment to Schedule A and the application for amendment to Schedule A is explained someplace in the book there.

Q Can you tell us what that involves? Briefly?

A That would require filing of a statement of use and an application to amend the zoning text and/or map. That would require the advertisement of a public hearing pursuant to State statute. It would require the holding of a public hearing and then the Commission would be responsible to make a decision on that application, giving reasons for approval or denial.

Q Okay. Any other steps a person could take?

A Well, I guess a person might take the approach of applying to the Zoning Board of Appeals for some type of a use or standard variance, and I'm not too familiar with that Board's

activities. But I guess it would be the same as the Zoning Commission. Hearing and advertisements.

(pp. 32-33)

* * *

Q Did the Planning and Zoning Commission ever see any studies on crowd control prior to issuance of their letter in April of 1979?

A Not to my knowledge.

Q Did the Planning & Zoning Commission have any studies with respect to parking control prior to issuance of that letter?

A No. I don't know where it was admitted but I seem to remember some type of a communication from the Chief of Police. But that's the vaguest of memories. . .

(pp. 41-42)

* * *

Q . . . To your knowledge, with the exception of Pinecrest since, say, 1975-76, have there been any outdoor musical events of any type in the City of Shelton in the last six or seven years?

A I can't recall one, really.

Q That's excluding a parade for Veteran's Day.

A Or the Memorial Day Band Concert?

Q Yes.

A I can't recall

(p. 42)

* * *

EXCERPT OF DEPOSITION TESTIMONY OF PETER SIRACO, POLICE CHIEF (FEBRUARY 7, 1983)

Q Let me ask you this, Chief. From your experience . . . crowd control depends on a bunch of variables, doesn't it?

A Yes, sir.

Q For example, an unruly crowd of 4,000 is quite different issue than say a very well behaved crowd 20,000?

A Yes. I would say so. Yes. If we had to handle them.

Q Yes.

A If something broke out, forget it.

Q Right. Okay. But an orderly crowd is an orderly crowd no matter how many there are. Is that correct?

A Yes, sir. I would say so.

(p. 39)

* * *

Q To your knowledge were there ever any discussions with the Zuckermans about the size of the crowds at Pinecrest?

A I think there was. Yes. Because we asked Mr. Zuckerman how many people he sold tickets to on Ticketron.

Q Yes?

A And also whether or not the would be selling tickets at the gate. And how many people he expected to be there. Yes. There was discussions on that.

Q Did the city, to your knowledge, ever propose to limit the size of audiences for any events at Pinecrest?

A To my knowledge, no.

(p. 40)

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